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Supreme Court, U.S.
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In The

Supreme Court Of The United States

SYED TALHA BOKHARI,
Petitioner,

v.

ERIC H. HOLDER, JR.,
ATTORNEY GENERAL OF THE UNITED STATES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner now seeks certiorari to review the following questions:

1. Whether a "period of stay authorized by the Attorney General" constitutes a "lawful status" for purposes of adjusting status to lawful permanent residence ("LPR") in the U.S.

2. Whether the term "lawful status" as used in Immigration and Nationality Act ("INA") §§ 245(c)(2) and (k), 8 U.S.C. §§ 1255(c)(2) and (k) only includes the classes of aliens described in 8 C.F.R. §§ 245.1(d)(1) and 1245.1(d)(1), the definition of "lawful immigration status."

3. Whether the 180-day time limit in INA § 245(k), 8 U.S.C. § 1255(k) includes all days an adjustment applicant is not in lawful status due to technical reasons or through no fault of his/her own.

PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rule 24.1(b), the following list identifies all of the parties before the United States Court of Appeal for the Fifth Circuit:

Syed Talha Bokhari was the Petitioner below, and he is the Petitioner in this action.

Eric H. Holder, Jr., Attorney General of the United States, was the Respondent below, and he is the Respondent in this action.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Appendix A, *infra*) is reported at 622 F.3d 357 (5th Cir.2010). The order of the United States Court of Appeals for the Fifth Circuit denying panel rehearing (Appendix D, *infra*) is unreported. The opinion of the Board of Immigration Appeals ("BIA") (Appendix B, *infra*) is unreported. The decision of the immigration judge ("IJ") (Appendix C, *infra*) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on September 29, 2010 (Appendix A, *infra*, 1a). The Court of Appeals subsequently denied Petitioner's timely request for panel rehearing on December 15, 2010 (Appendix D, *infra*). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

1. INA §§ 245(a),(c), (i), and (k), 8 U.S.C. §§ 1255 (a), (c), (i), and (k)
2. INA § 237(a)(1)(C), 8 U.S.C. § 1227(a)(1)(C)
3. INA § 212(a)(9)(B), 8 U.S.C. § 1182(a)(9)(B)

The complete text of the aforementioned statutory provisions is reproduced in Appendix F, *infra*, 46a-57a.

STATEMENT OF THE CASE

The INA allows certain aliens in the U.S. to apply for adjustment of status to lawful permanent residence ("LPR"). INA § 245(a), 8 U.S.C. § 1255(a). Adjustment of status is generally unavailable to aliens who have worked without proper authorization, are not in a lawful immigration status, or have failed to continuously maintain a lawful status in the U.S. INA §§ 245(c)(2), (7), and (8), 8 U.S.C. § 1255(c)(2), (7), and (8). However, INA § 245(k), 8 U.S.C. § 1255(k) specifically exempts an alien sponsored by an employer for LPR from these bars to adjustment if s/he is present in the U.S. pursuant to a lawful admission and has not spent more than 180 days total without maintaining lawful status, working without authorization, or otherwise violating the terms and conditions of admission.

Every year over 600,000 aliens apply for adjustment of status by affirmatively filing form I-485, Application to Register Permanent Residence and Adjust Status, with U.S. Citizenship and Immigration Services ("USCIS"). If their I-485s are denied, adjustment applicants have no right to appeal the adverse decisions. Their sole recourse is to renew their I-485 applications in removal (deportation) proceedings in immigration court. The immigration court system is a component of the U.S. Department of Justice's Executive Office for Immigration Review ("EOIR"). Attorneys with U.S. Immigration and Customs Enforcement ("USICE") represent the federal government in removal proceedings.

Although USCIS and USICE are both subsidiary agencies of the U.S. Department of Homeland Security ("USDHS") and thereby administer and interpret the INA, USDHS and EOIR have separate and distinct powers to promulgate regulations under the INA. USDHS's regulations are found in 8 C.F.R. §§ 1.1-499.1; EOIR's regulations are located at 8 C.F.R. §§ 1001.1-1337.10. To date, USDHS and EOIR have neither amended their existing regulations nor promulgated new regulations to reflect the enactment of INA § 245(k), 8 U.S.C. § 1255(k) in 1997.

This Court and the courts of appeal have frequently struggled to correctly interpret various provisions of the INA to give effect to congressional intent and to ensure fairness and consistency in adjudications, whether before USCIS or EOIR. When the statute is silent or vague on the issue in question and implementing regulations are absent or outdated or unclear, the agency's answer will typically control so long as it is not arbitrary, capricious, or unreasonable. The judiciary's standard practice has been to apply longstanding principles of statutory construction to assess whether the agency's interpretation was appropriate and if the courts should defer to it. Every single circuit, including the Fifth Circuit, has routinely analyzed competing interpretations of the INA under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1983) ("*Chevron*"). In many cases, courts of appeal have also evaluated agency guidance materials under the less deferential standard of "respect" contemplated by *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) ("*Skidmore*"). Courts have historically refused to disturb interpretations grounded in the plain language of the INA and which advance legitimate legislative and policy goals.

Nevertheless, in the instant cause the U.S. Court of Appeals for the Fifth Circuit seemed to inexplicably abandon decades of controlling precedents to achieve a particular result. Despite a distinct lack of regulations and pertinent case law,

the Fifth Circuit held that nothing in INA §§ 245(c) and (k), 8 U.S.C. §§ 1255(c) and (k) was ambiguous even though ultimately USCIS, as evidenced by a policy memorandum binding on its employees in I-485 adjudications, and Respondent reached strikingly dissimilar conclusions about Petitioner's eligibility for adjustment. Without addressing what statutory language unequivocally indicated that Respondent's interpretation was proper, the court evaded a *Chevron* analysis. The Fifth Circuit reasoned that the parallel agency regulations defining "lawful immigration status," 8 C.F.R. §§ 245.1(d)(1) and 1245.1(d)(1), foreclosed Petitioner from seeking adjustment although both predated the enactment of INA § 245(k), 8 U.S.C. § 1255(k), and that the rule of lenity was inapplicable because no matters of doubt existed. The court upheld the single-member panel decision of the BIA to pretermit Petitioner's I-485.

To understand how the Fifth Circuit arrived at this highly unusual result, a thorough review of the history of this case is in order. Because several federal agencies have ruled on different aspects of Petitioner's immigration status over the past eight years, the facts are extremely complex and raise challenging legal issues. Indeed, as Petitioner will discuss *infra*, the Fifth Circuit's opinion strongly suggested that the intricacies of U.S. immigration law and the peculiar facts of Petitioner's situation truly perplexed and exasperated them.

A. Proceedings before U.S. Citizenship and Immigration Services ("USCIS")

Petitioner is a native and citizen of Pakistan. He last entered the U.S. on April 9, 2001, as a B-2 nonimmigrant visitor and obtained two extensions of stay, allowing him to remain in the U.S. through October 9, 2002. He legally incorporated Syed T. Enterprises, Inc., ("STE") a Texas subsidiary of his Pakistan-based company Mir Motors. STE later filed an I-129, Petition for Nonimmigrant Worker, and supporting documents with USCIS to classify Petitioner as an L-1A nonimmigrant multinational manager or executive and to extend his authorized stay. STE intended for Petitioner to direct and build up the new U.S. enterprise. USCIS approved the petition, changed Petitioner's nonimmigrant status from B-2 to L-1A, and granted him a period of authorized stay from June 11, 2002, through June 10, 2003.

On June 9, 2003, STE requested an extension of stay in L-1A status for Petitioner by filing a second form I-129 and supporting documents. USCIS denied this petition on March 19, 2004, stating that Petitioner's previously approved job duties were not sufficiently managerial or executive in nature. STE timely appealed this denial by filing form I-290B, Notice of Appeal to USCIS's Administrative Appeals Office ("AAO"), on April 19, 2004. On September 2, 2005, the AAO dismissed the appeal.

Meanwhile, on June 7, 2004, STE filed form I-140, Immigrant Petition for Alien Worker, on behalf of Petitioner, seeking to classify him as a multinational manager or executive (commonly known as an "EB-13 immigrant visa"). If approved, this petition would enable Petitioner to obtain lawful permanent residence ("LPR") in the U.S. In support thereof, STE provided substantially the same assurances and evidence that it had submitted in the earlier I-129 proceedings. Since an immigrant visa would be immediately available to Petitioner upon approval of the I-140, he simultaneously filed his form I-485 as permitted by 8 C.F.R. § 245.2(l)(i). On July 11, 2005, nearly two months before the AAO issued its decision in STE's L-1A appeal, USCIS approved STE's I-140 for Petitioner.

But on September 20, 2005, USCIS denied Petitioner's I-485. Its brief decision declared that he lacked lawful status from June 11, 2003, until he filed his I-485 on June 8, 2004. USCIS claimed that because he failed to maintain a lawful status for a period of more than 180 days prior to filing for adjustment, he was ineligible to seek LPR in the U.S. under INA §§ 245(a) and (k), 8 U.S.C. §§ 1255(a) and (k). USCIS later served Petitioner with an I-862, Notice to Appear ("NTA") in removal proceedings on or about December 27, 2006.

B. Proceedings before the immigration court

The NTA prepared by USCIS and filed with the Houston Immigration Court alleged that Petitioner was not a U.S. citizen but rather a native and citizen of Pakistan; that he was admitted to the U.S. on April 9, 2001, as a B-2 visitor; that he changed his status to an L-1A multinational manager or executive on June 11, 2002, with validity through June 10, 2003; and that his L-1A status expired on June 10, 2003. The NTA charged him with failing to maintain or comply with the conditions of his nonimmigrant status in violation of INA § 237(a)(1)(C)(i), 8 U.S.C. § 1227 (a)(1)(C)(i)).

Petitioner first appeared in the Houston Immigration Court before Immigration Judge ("IJ") Clarease Rankin Yates on February 7, 2007. Petitioner, through then counsel of record Jonathan H. Lamb, admitted all of the factual allegations on the NTA *except* that he failed to maintain and comply with the conditions of his nonimmigrant status. As a result, Petitioner refused to concede the charge of removability. After some discussion, USICE attorney Erica J. McGuirk agreed to amend the text of this allegation. Petitioner then admitted *only* that his request for an extension of stay in L-1A status had been denied and conceded the charge of removability on that basis. As relief from removal, Petitioner sought adjustment of status to

LPR by renewing his I-485 previously denied by USCIS (the I-140 approval was unaffected by USCIS' denial of the I-485). IJ Yates ordered Petitioner to refile his I-485 with the court by April 11, 2007, and scheduled a hearing on the merits of his request for relief for May 15, 2007.

Petitioner timely complied with the IJ's order and appeared for his individual hearing on May 15, 2007. USICE attorney Gerrie Zhang surprised Petitioner with a two-page motion to pretermit his I-485, contending that he was barred from adjustment under INA § 245(c)(2), 8 U.S.C. § 1255(c)(2) because he did not have a "lawful immigration status" in the U.S. on June 8, 2004, the date he filed his I-485 with USCIS. USICE counsel also alleged that INA § 245(k), 8 U.S.C. § 1255(k) did not exempt him from ineligibility since Petitioner's lawful status ended when his L-1A expired on June 10, 2003, and that Petitioner had thus been in "unlawful immigration status for nearly four years." IJ Yates granted Petitioner time to file a written response to the motion to pretermit and rescheduled Respondent's hearing on the merits for August 17, 2007.

On June 21, 2007, Petitioner filed his opposition to USICE's motion, asserting that he was in fact eligible for adjustment of status. Petitioner argued that STE timely filed an I-129 to extend his authorized stay as an L-1A nonimmigrant with USCIS and properly appealed

the denial of this petition to the AAO. Petitioner noted that 8 C.F.R. § 245.1(d)(2) defined the phrases "no fault of the applicant" and "for technical reasons" in INA § 245(c)(2), 8 U.S.C. § 1255(c)(2) to include individuals whose lack of lawful status was caused by USCIS inaction on pending applications. Petitioner maintained that this regulation clearly indicated that all the time he waited for USCIS to act on STE's I-129 and subsequent AAO appeal would not invoke the bar to adjustment eligibility in INA § 245(c)(2), 8 U.S.C. § 1255(c)(2). Petitioner also reasoned that because a separate regulation, 8 C.F.R. § 274a.12(b)(20), automatically authorized him to continue working lawfully in the U.S. under the terms and conditions of his original L-1A classification for 240 days during the pendency of the I-129 filing, whether he was in unlawful immigration status as of June 11, 2003, was not at all certain. Petitioner pointed out that USCIS's operational guidance considered him to be in a "period of authorized stay" for as long as the I-129 was pending before them. *See* Memo, Pearson, Exec. Assoc. Comm. Field Operations (HQADN 70.21.1.24.P, AD 00-07) (Mar. 3, 2000). He observed that USICE had cited no authority to support its contention that a "period of authorized stay" was not a "lawful immigration status." Petitioner contended that it was patently illogical for USDHS to permit aliens to remain in the U.S. and to work lawfully while nonimmigrant extension requests were pending yet still be able to argue

that aliens were in unlawful immigration status during the same time period so as to justify deportation proceedings or the denial of adjustment of status.

Petitioner further asserted that because the 240-day period of employment authorization allowed by 8 C.F.R. § 274a.12(b)(20) did not end until February 5, 2004, and he filed his I-485 with USICE on June 8, 2004, he was well within the 180-day limit of INA § 245(k), 8 U.S.C. § 1255(k). Consequently, notwithstanding USCIS's denial of his I-485, he was in fact eligible for adjustment at the time he filed. Petitioner encouraged the judge to follow the rule of lenity, a venerable principle in immigration law that matters of doubt must be resolved in his favor, and deny pretermission.

A mere three weeks prior to Petitioner's final hearing date, USICE counsel filed a reply to Petitioner's opposition. USICE stated that *Matter of L-K-*, 23 I&N Dec. 677 (BIA 2004), held that a failure to maintain lawful status was not "for technical reasons" when an alien's nonimmigrant status expired while an application was pending with USCIS. In addition, USICE urged that *Matter of Teberen*, 15 I&N Dec. 689 (BIA 1976), stood for the proposition that once an alien's period of lawful admission expires, s/he is deportable as an "overstay" and lacking in lawful status unless and until an extension of stay is approved. Finally, USICE argued that the Pearson memorandum

addressing "periods of stay authorized by the Attorney General" was irrelevant since it interpreted unlawful presence under INA § 212(a)(9)(B), 8 U.S.C. § 1182(a)(9)(B) and as a USCIS policy document was also not binding on the IJ or the BIA.

Petitioner last appeared before IJ Yates on August 17, 2007. IJ Yates granted USICE's motion to pretermit and refused to consider Petitioner's I-485 and supporting evidence. IJ Yates allowed Petitioner's counsel to seek postmerits voluntary departure as an alternative form of relief from removal. Petitioner testified solely about his eligibility for voluntary departure.

C. The decision of the immigration court

In an oral decision at the conclusion of the hearing on the merits (Appendix D, *infra*), IJ Yates found that Petitioner's lawful status terminated on June 10, 2003, and that he did not file his I-485 with USCIS until June 8, 2004. IJ Yates accepted USICE's claim that he was ineligible for adjustment under INA §§ 245(a) and (k), 8 U.S.C. §§ 1255(a) and (k) and pretermitted his I-485. IJ Yates did not discuss Petitioner's other arguments or the BIA decisions relied upon by USICE. IJ Yates granted Petitioner sixty days to voluntarily depart the U.S. in lieu of removal. Bokhari reserved appeal.

D. Proceedings before the Board of Immigration Appeals ("BIA")

On September 11, 2007, Petitioner timely appealed the decision of IJ Yates to the BIA. He attached a detailed statement in support of overturning the IJ's decision to pretermit his I-485 to his notice of appeal and requested that a three-member panel of the BIA hear his case.

On December 14, 2007, Petitioner filed his opening brief, reiterating his arguments at trial and highlighting the logical inconsistencies in his adjustment proceedings before USCIS and the IJ. He stressed that while USCIS denied STE's request to extend his status as a nonimmigrant multinational manager or executive, the agency later approved STE's I-140 requesting an immigrant visa in this category based upon the same underlying facts and including nearly identical supporting evidence. (USCIS has never attempted to revoke the approved I-140, and it remains valid to this day.) USCIS's paradoxical decisions lend credence to Petitioner's argument that his lack of lawful status after June 11, 2003, if any, was for technical reasons or through no fault of his own.

Petitioner also observed that prior to June 11, 2003, he derived his employment authorization in

the U.S. from his L-1A classification. When 8 C.F.R. § 274a.12(b)(20) automatically gave him permission to work for an additional 240 days while USCIS considered STE's I-129 extension, he averred that he had lawful status in the U.S. Petitioner argued that USICE's position that during this time period his physical presence in the U.S. became illegal but his ongoing employment with STE remained lawful was per sē irrational.

In addition, Petitioner asserted that USICE's refusal to defer to USCIS policy guidance in his case conflicted with its stances in other removal cases wherein USICE relied upon the same or similar USCIS interpretive documents to justify deportations and denials of relief. He contended that nothing in the INA or 8 C.F.R. nor any relevant legal precedent compelled pretermission of his I-485 and that the IJ did not sufficiently analyze the issues in his case. Petitioner urged the BIA to overturn the IJ's decision and remand his case for a full hearing on his I-485.

On January 4, 2008, USICE filed a one-page boilerplate motion for summary affirmance, stating that IJ Yates' decision was correct in all aspects and should remain undisturbed. USICE never filed a brief or any other response to Petitioner's arguments with the BIA.

The BIA upheld the IJ's decision in a short single-member panel opinion dated June 17, 2009. This decision contained patent errors of law. The BIA improperly characterized INA § 245(k), 8 U.S.C. § 1255(k) as a "waiver," a discretionary form of forgiveness in immigration law that typically require applicants to demonstrate good reasons for approval. Nothing in the statute suggests that the protection afforded by INA § 245(k), 8 U.S.C. § 1255(k) is discretionary. The BIA also erroneously wrote that 8 C.F.R. § 1245.1(d)(1) defined "lawful status" when it actually defines "lawful immigration status."

The opinion also referred to a USCIS memorandum issued while Petitioner's case was on appeal to the BIA for its conclusion that Petitioner lost lawful status on June 11, 2003. Memo, David Neufeld, Acting Associate Director, Domestic Operations, USCIS, "Applicability of Section 245(k) to Certain Employment-Based Adjustment of Status Applications filed under Section 245(a) of the Immigration and Nationality Act," July 14, 2008 (Appendix E, *infra*). The BIA stopped short of adopting this document as its accepted interpretation, determining instead that *Matter of Teberen*, 15 I&N Dec. 689 (BIA 1976), still controlled. The BIA accordingly upheld the IJ's order of pretermission.

E. Proceedings before the U.S. Court of Appeals for the Fifth Circuit

Petitioner subsequently filed a petition for review of the BIA's final administrative order with the U.S. Court of Appeals for the Fifth Circuit on July 16, 2009. Petitioner timely submitted his opening brief on October 12, 2009.

Petitioner argued that the BIA erred in sustaining the IJ's decision to pretermit his I-485 for several reasons. First, the finding that he had no lawful status after June 10, 2003, was not based on the plain reading of the relevant laws and regulations. The INA and 8 C.F.R. authorize individuals with pending extensions of stay to remain in the U.S. and, in the case of L-1A nonimmigrants, to work legally for at least a period of 240 days. Moreover, the benefits of INA § 245(k), 8 U.S.C. §1255(k) are not limited to aliens in "lawful immigration status" since the statute refers only to "lawful status." USICE's convoluted legal interpretations that resulted in Petitioner simultaneously being in a "period of authorized stay" but also in "unlawful status" blatantly contradicted Congressional and agency intent. He explained that besides predating both the promulgation of 8 C.F.R. § 274a.12(b)(20) and the enactment of INA § 245(k), 8 U.S.C. §1255(k), *Matter of Teberen*, 15 I&N Dec. 689 (BIA 1976) was factually inapposite to Petitioner's situation. He discussed at length the reasoning of a decision of

the U.S. District Court of Connecticut in a case still pending before it, *El Badrawi v. Department of Homeland Security*, 579 F.Supp.2d 249 (D.Conn. 2008), which challenged the continuing authority of *Teberen* in light of later amendments to the INA and 8 C.F.R., including 8 C.F.R. § 274a.12(b)(20). He concluded that the IJ's and BIA's reliance on USICE's flawed arguments failed to accord with controlling precedents which require matters of doubt in removal proceedings to be resolved in favor of the alien and for ameliorative statutory provisions to be interpreted liberally.

Respondent, through USDOJ counsel Jessica R.C. Malloy, timely filed his reply brief on December 9, 2009. Respondent essentially repeated USICE's earlier arguments at trial but added a new claim never raised with the BIA, namely that Petitioner failed to exercise other available options to avoid his current predicament. Respondent's counsel argued that Petitioner could have waited overseas for STE's I-129 extension to be approved and then could have obtained a new L-1A from a U.S. consulate to reenter the U.S. Respondent's counsel further argued that Respondent could have sought adjustment of status at a U.S. consulate instead of applying to USCIS or before the IJ. (Respondent's counsel has since conceded that adjustment of status is a process that can only occur within the U.S.) Respondent urged the Fifth Circuit to deny the petition for review and preserve the BIA decision.

On July 13, 2010, the Fifth Circuit ordered oral argument before a three-member panel, which was promptly scheduled in New Orleans, Louisiana, for Tuesday, August 31, 2010. At oral argument, counsel for Petitioner emphasized that Respondent has never cited to any statutory or regulatory provision defining "lawful status" and never clarified why Congress wrote "lawful status" into INA § 245(k), 8 U.S.C. §1255(k) instead of "lawful immigration status." Counsel stressed that Respondent's contention that a "period of authorized stay" is not necessarily a "lawful status" is not borne out in the INA or 8 C.F.R. Petitioner's counsel further noted that the bulk of the legal authority relied upon by USICE and Respondent predated the enactment of INA § 245(k), 8 U.S.C. §1255(k), a fact which has been roundly ignored. Petitioner's counsel highlighted the absurd results that flow from Respondent's posture, lamenting that Petitioner finds himself in removal proceedings even though he reasonably relied upon and strictly obeyed the rules in 8 C.F.R. in seeking to maintain a valid immigration status.

Counsel for Respondent chose to argue that in the absence of explicit regulations the Fifth Circuit should defer to the interpretations and findings of the BIA. Respondent's counsel took the position that despite the instructive value of USCIS memoranda on vital issues, they were not binding in removal proceedings and Respondent could

permissibly advance conflicting interpretations and claims in litigation.

Less than a month later, on September 29, 2010, the panel issued its decision (Appendix A, *infra*) denying the petition for review. It refused to disturb the decision of the BIA and evaded a comprehensive examination of the difficult questions raised by this case. The opinion included distressing inaccuracies, e.g., referring to the I-140 petition as an "application for permanent resident status" (Appendix A, 4a) and implying that USCIS's denial of STE's I-129 had cut "short" his 240-day period of authorized employment when the denial was not made until 282 days after it was filed (Appendix A, 9a). It also failed to resolve lingering disputes such as why the 180-day time limit in INA § 245(k), 8 U.S.C. § 1255(k) was exceeded when Petitioner's lack of lawful status was clearly for "technical reasons" from June 11, 2003, to March 19, 2004.

On November 15, 2010, Petitioner timely filed a petition for panel rehearing. Petitioner argued that the panel decision conflicted with USCIS's stated interpretation of INA § 245(k), 8 U.S.C. § 1255(k), Congressional intent, and existing Fifth Circuit precedent. Petitioner detailed the history surrounding the term of art "period of stay authorized by the Attorney General" and cited to both the INA and various administrative materials to show that Congress as well as USCIS sought to

exempt aliens in periods of authorized stay from many negative consequences. Petitioner contended that under the circumstances it was logically inconsistent for USICE to claim that an authorized stay was not a "lawful status" and that other penalties could still attach, e.g., an inability to adjust status or deportation.

Petitioner urged the Fifth Circuit to carefully reread the Neufeld memo which USICE and the BIA had relied upon for the proposition that a "period of authorized stay" is not necessarily a "lawful status." USCIS did not claim that "lawful status" was the same as "lawful immigration status" as defined by 8 C.F.R. §§ 245.1(d)(1) or 1245.1(d)(1). Instead, USCIS instructed its employees that technical violations or violations incurred "through no fault of the applicant" do not invoke INA § 245(c)(2), 8 U.S.C. § 1255(c)(2) and that these periods of unlawful status do not count towards the 180-day period in INA § 245(k), 8 U.S.C. § 1255(k) (Appendix F, *infra* at 42a-43a). Petitioner also demonstrated that the assumption that "lawful status" equated to "lawful immigration status" was erroneous and begged the court to correctly apply the customary principles of statutory interpretation.

On December 15, 2010, the Fifth Circuit denied rehearing in a one-line decision (Appendix E, *infra*). This petition followed.

REASONS FOR GRANTING THE PETITION

When different agencies of the federal government are allowed to interpret the same statutory provisions and both agencies may grant or deny the same application in nonparallel proceedings, consistency in the interpretation and application of the law becomes of paramount importance. When neither agency has issued regulations for a particular statute but one agency has issued policy guidance and memoranda that interpret said statute and that are binding on its employees and in its adjudications, permitting other agencies within the federal government to summarily disregard these interpretative statements and substitute their own reasoning when reviewing the same issues in the same application involving the same affected party offends due process and equal protection. Capricious variation in the application of immigration laws is intolerable and contrary to Congressional intent.

A. This Court should grant review to resolve a square conflict among the Courts of Appeals.

The Fifth Circuit opinion in this case squarely raises an issue about which there is an acknowledged conflict among the circuits, namely, whether, when an agency has failed to promulgate

regulations pursuant to the notice and comment provisions of the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, courts must defer to an agency's interpretation of a statute in accordance with this Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ("*Chevron*") or must give the agency's interpretation appropriate "respect" as required by this Court's decision in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) ("*Skidmore*") or may mandate its own interpretation of the law instead. This issue is a recurring and important one, as demonstrated by the vast number of judicial decisions at all levels involving questions of statutory construction and addressing agency interpretations of statutes and regulations pursuant to the standards enunciated in *Chevron* and *Skidmore*.

1. The Courts of Appeal are split regarding the interpretation of the INA in the absence of formal regulations.

As noted *supra*, the traditional practice in cases involving a challenged interpretation of a provision in the INA or 8 C.F.R. is for the courts to examine the language of the law or regulation and review the agency's position against its plain meaning. In cases where the language is ambiguous, courts must determine whether the interpretation is a permissible construction of the law. The Courts of Appeal have considered

thousands of cases under this framework in the context of immigration law. As a result, Petitioner will only briefly mention selected recent precedential decisions to demonstrate the drastic departure taken by the Fifth Circuit in his case.

Initially, Petitioner notes that the Fifth Circuit has considered the value of nonbinding agency guidance in removal proceedings previously. In *Masih v. Mukasey*, 536 F.3d 370 (5th Cir.2008), the court held that although a relevant USCIS operation instruction was not binding on EOIR in removal proceedings, both the IJ and the BIA erred in not considering it. **Id.** at 375. The court noted that the BIA had previously found operation instructions to be persuasive and had relied upon the same one at issue in *Masih* in a prior case, *Matter of Ho*, 15 I&N Dec. 692 (BIA 1976). **Id.** The Fifth Circuit granted Masih's petition for review and remanded his case to the BIA for reconsideration. In the instant cause, the BIA actually cited to a USCIS policy document in its decision, the Neufeld memo, in support of one of its findings, but as in *Masih* the BIA did not explain why it was not persuasive authority on other key issues. Yet the Fifth Circuit elected not to remand this case to the BIA for reconsideration.

Acosta v. Gonzales, 439 F.3d 550 (9th Cir.2006), involved a question of statutory interpretation as confounding as Petitioner's situation. The Ninth Circuit followed the dictates

of *Chevron* and first considered the language and design of INA §§ 212(a)(9) and 245(i), 8 U.S.C. §§ 1182(a)(9) and 1255(i) to give effect to Congressional intent. Id. at 552-553. The court found that the INA did not directly address whether Acosta was eligible for adjustment, but ironically, USICE submitted guidance memoranda of the legacy Immigration and Naturalization Service in support of its interpretation that he was barred from LPR status. Id. at 554-555. The court also observed that, "Where Congress uses words more than once in the same statute, we presume that those words have the same meaning." *Acosta* at 557 *citing Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir.1991).

Similarly, in *Padillla-Caldera v. Gonzales*, 426 F.3d 1294 (10th Cir.2005), the court of appeals reiterated that "conflicting statutes should be interpreted so as to give effect to each but to allow a later enacted, more specific statute to amend an earlier, more general statute." Id. at 1298 *citing Smith v. Robinson*, 468 U.S. 992, 1024 (1984). The Court opined that while statutory language was always the correct starting point, courts may also consider the circumstances surrounding the enactment of new law and the interplay of new statutory provisions with the existing legal framework. Id. at 1299. Based on the reasoning of these two decisions, had Petitioner's removal proceedings originated in either the Ninth or Tenth Circuits it is likely that his case would have been

remanded back to the BIA for further consideration on the issue of eligibility.

The First Circuit has also ruled that courts should listen "with care to the agency's interpretation insofar as it has the power to "persuade" if not to "control." " *Molina v. INS*, 981 F.2d 14, 20 (1st Cir.1992) *citing Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944). The Third Circuit's recent decision in *Gallimore v. Attorney General of the U.S.*, 619 F.3d 216 (3d Cir.2010), reminded the BIA that it must articulate the reasoning behind its decisions in order for courts to properly review them. Id. at 227. Because the court believed that the BIA had based its decision on a factual inaccuracy that was crucial to a resolution of the alien's claims, remand was required. Id. at 226-227. Again, if Petitioner's removal proceedings arose in either of these circuits, it appears that these courts would have instructed the BIA to reconsider its decision in light of the Neufeld memo. The result in Petitioner's case would likely have been different.

The practical result of the conflict among the circuits is that whether an alien remains eligible to seek adjustment of status in removal proceedings depends largely on which circuit court of appeal has jurisdiction over the immigration court in which the removal proceedings occur. As of today, IJs in the Fifth Circuit can legally pretermit the I-485s of aliens like Petitioner by summarily refusing to

acknowledge or apply nonregulatory USCIS memoranda. Aliens in other circuits, however, may not face pretermission of their I-485s and may very well obtain lawful permanent residence in the U.S. in removal proceedings because the BIA (and presumably IJs) must engage in a far more detailed analysis of the law and properly consider the interpretations and persuasiveness of USCIS memoranda in their deliberations.

2. The decision below conflicts with relevant authority of this Court.

A major concern in this case was the inexact use of terms of art that have specific meanings in immigration law. As noted *supra*, while 8 C.F.R. §§ 245.1(d)(1) and 1245.1(d)(1) define the phrase "lawful immigration status," Congress did not draft INA § 245(c)(2), 8 U.S.C. § 1255(c)(2) so that only people in "lawful immigration status" could qualify for the technical violation/no fault exceptions. Nor did Congress limit the applicability of INA § 245(k), 8 U.S.C. § 1255(k) only to individuals in "lawful immigration status." Congress instead used the words "lawful status" in both subsections.

The absence of the phrase "lawful immigration status" in INA § 245(k), 8 U.S.C. § 1255(k) is significant because when Congress enacted this provision in November 1997, both INA § 245(c)(2), 8 U.S.C. § 1255(c)(2) and 8 C.F.R. §

245.1(d)(1) had already been in force for about ten years. This Court has held that "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." *Kucana v. Holder*, 130 S.Ct. 827, 837-38 (2010), *quoting Nken v. Holder*, 129 S.Ct. 1749, 1759 (2009); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987). Congress is presumed to know existing law when it legislates, including an administrative or judicial interpretation of a particular statute. *Lorillard v. Pons*, 434 U.S. 575, 581 (1978); *Matter of Gomez-Giraldo*, 20 I&N Dec. 957, 964 n.3 (BIA 1995).

Respondent has yet to explain in this case why "lawful status" in the Act is the equivalent of "lawful immigration status" in its regulations, and the IJ, the BIA, and the Fifth Circuit all conspicuously avoided discussing why the usual presumptions of statutory construction do not apply. The rule of lenity requires any matters of doubt in these proceedings to be resolved in Petitioner's favour. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987); *INS v. Errico*, 385 U.S. 214, 225 (1966); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10, (1948). If Congress intended for the benefits of INA §245(k), 8 U.S.C. § 1255(k) to only apply to aliens in "lawful immigration status," it could have written that phrase into the statute. Congress did ***not*** write the law thusly, leading to the logical inference that

Congress intended more aliens than those who fit within USCIS' regulatory definition of "lawful immigration status" to enjoy the protections of this subsection.

Respondent has deliberately chosen not to define "lawful status" in 8 C.F.R. by promulgating regulations. Respondent should not be able to use a willful abdication of his constitutional responsibilities to gain an unfair advantage against aliens like Petitioner in removal proceedings.

B. This case presents a frequently recurring issue of national importance.

1. The outcome of hundreds of thousands of applications for adjustment of status depends on the resolution of the questions presented.

According to USCIS's own statistics, 667,776 people, or 59.1% of all green cards issued in fiscal year 2009, received their LPR status through approved adjustment of status applications. *Yearbook of Immigration Statistics: 2009.* Washington, D.C.: U.S. Department of Homeland Security, Office of Immigration Statistics, 2010. Over 126,000 green cards approved in fiscal year 2009 were allocated to the employment-based immigrant visa categories covered by INA § 245(k), 8 U.S.C. § 1255(k). Id. Aliens obtained approximately 92.4% of these green cards via

adjustment. Id. NB: these figures only represent approved LPR cases and do not include the thousands of adjustment of status cases currently pending with USCIS.

While admittedly not all employment-based adjustment applicants need to avail themselves of the protection of INA § 245(k), 8 U.S.C. § 1255(k) how USDHS and EOIR define the phrase "lawful status" in INA § 245(c)(2), 8 U.S.C. § 1255(c)(2) affects *all* applicants for adjustment of status. If "lawful status" does not include time spent in a "period of stay authorized by the Attorney General," aliens may find themselves forever prohibited from obtaining LPR in the U.S. Moreover, as in the case at bar, aliens might be rendered ineligible for adjustment due to circumstances wholly out of their control (employer or government error) despite having diligently complied with the law and USCIS's procedures.

Neither the BIA nor the Fifth Circuit recognized the inherent danger in allowing Respondent in removal proceedings to assert an interpretation of the INA that diverges wildly from the interpretation of USCIS in its adjudications of the same applications. Respondent wants to change the rules whenever he so desires without notice and in utter disregard of the consequences to aliens instead of pursuing consistency in adjudications and equal treatment of applicants.

This Court should not allow Respondent to act in this fashion.

2. The lack of uniformity is producing drastically different results in identical cases nationwide.

One issue Petitioner and Respondent agree upon in this case is that the Neufeld memo is binding on all USCIS employees in adjudications of adjustment of status cases. Unfortunately for Petitioner, this memo did not exist until nearly three years after USCIS denied his I-485. Similarly situated aliens whose I-485s were then pending at USCIS or filed with them after this memo took effect have undeniably been approved for LPR status.

Meanwhile, aliens like Petitioner are barred from adjustment in removal proceedings because USICE and Respondent refuse to follow the Neufeld memo. Although Mr. Neufeld's guidance - in the absence of regulations - is sufficiently rational for USCIS employees to obey when they adjudicate I-485s, Respondent nevertheless swears that he has the authority to interpret the law differently, even if he violates aliens' constitutional rights to equal protection under the law.

If USCIS fails to follow its binding interpretations and erroneously denies an alien's I-485 application, in the Fifth Circuit at least the

alien cannot insist that the IJ consider, much less apply, USCIS policy guidance when renewing an I-485 in removal proceedings, as Respondent has strongly suggested is the law in this case. Thus, an IJ may completely disregard the strictures under which the earlier USCIS adjudication of the I-485 occurred. The IJ can also effectively deny *all* review of the USCIS decision by finding that the alien was ineligible for adjustment of status ab initiō and pretermitting consideration of the alien's I-485. Consequently, an alien may be prohibited from ever acquiring lawful permanent residence in the U.S.

An alien's eligibility for adjustment of status should not depend on the forum in which his I-485 is adjudicated. Whether an alien is eligible to apply for adjustment should be readily discernible and consistent in proceedings before both USCIS and the IJ. Respondent's contrary stance promotes disunity among the circuits as well as between USDHS and EOIR in the administration of the INA.

C. The Court of Appeals erred in upholding the decision to pretermit Petitioner's application for adjustment of status.

1. A "period of stay authorized by the Attorney General" is a "lawful status."

This Court has consistently ruled that statutes should be interpreted such that every word

or phrase has meaning and is neither superfluous nor lacking in operative effect. *Bailey v. U.S.*, 516 U.S. 137, 145 (1995); *United States v. Menasche*, 348 U.S. 528, 538-539 (1955). Per INA § 212(a)(9)(B)(ii), 8 U.S.C. § 1182(a)(9)(B)(ii), an alien who is in an authorized stay is lawfully present in the U.S. The statute plainly indicates that s/he does *not* become unlawfully present until this authorized stay ends. Congress defined several categories of authorized stays in the statute but did not rule out the possibility that others might exist. INA § 212(a)(9)(B)(iii), 8 U.S.C. § 1182(a)(9)(B)(iii). USCIS subsequently decreed that other situations ***not*** expressly listed in the statute constituted authorized stay such that aliens did not accrue unlawful presence. *See* Memo, Neufeld, Scialabba, Chang, USCIS, "Consolidation of Guidance Concerning Unlawful Presence," (May 6, 2009) at 6-7. All aliens considered to be in a "period of stay authorized by the Attorney General" avoid the harsh consequences that befall aliens who are unlawfully present in the U.S.

Respondent has nevertheless argued that "authorized stay" is not always "lawful status" for adjustment of status purposes yet cites to no statutory or regulatory authority for this proposition. Petitioner cannot fathom why the INA would protect him from being deported and accruing unlawful presence in the U.S. while STE's I-129 extension was pending yet simultaneously render him ineligible for adjustment. When

Congress acts to prevent cruel results, the statute will be interpreted and applied in an ameliorative fashion. Generous statutory provisions must be generously interpreted. *Matter of Vizcaino*, 19 I&N Dec. 644, 648 (BIA 1988). Different sections of the statute must therefore be construed harmoniously because acts of Congress " 'should not be read as a series of unrelated and isolated provisions.' " *Martinez v. Mukasey*, 519 F.3d 532, 541 (5th Cir.2008) *citing Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 570, 115 S.Ct. 1061, 131 L.Ed.2 1 (1995). "Plain statutory language is the most instructive and reliable indicator of Congressional intent." *Martinez, supra,* at 543, *citing White v. INS*, 75 F.3d 213, 215 (5th Cir.1996).

Even if this Court believes that USCIS has mostly unfettered discretion to deny adjustment to aliens, Respondent's insistence that while waiting for the appeal of the I-129 denial to be adjudicated by USCIS, Petitioner was neither in a "period of authorized stay" nor in "lawful status" should prompt grave concerns. In situations such as Petitioner's, the employer either forsakes the alien's services or continues to employ him/her unlawfully while it appeals to the AAO. The alien employee who fails to depart the U.S. while the I-129 appeal is pending accrues unlawful presence under INA § 212(a)(9)(B), 8 U.S.C. § 1182(a)(9)(B). So even if USCIS wrongly or illegally denies an I-129 extension request, both the employer and the

employee suffer negative consequences simply for pursuing a right to appeal.

In the absence of formal regulations defining "lawful status" and "authorized stay," Respondent should not be allowed to argue that Petitioner is ineligible for adjustment for remaining in the U.S. past the expiration date of his original L-1A petition. STE and Petitioner reasonably relied on other provisions of the INA and 8 C.F.R. and actively sought to ensure that Petitioner maintained a valid immigration status in the U.S. at all times. Neither the INA nor 8 C.F.R. put STE or Petitioner on notice that remaining in the U.S. during the "period of authorized stay" while his I-129 was pending could render him ineligible for adjustment in the future.

2. "Lawful status" is not equivalent to "lawful immigration status."

The Fifth Circuit's position that the term of art "lawful status" in INA §§ 245(c)(2) and (k)(2)(A), 8 U.S.C. §§ 1255(c)(2) and (k)(2)(A) was the functional and legal equivalent of the phrase "lawful immigration status" as defined in 8 C.F.R. § 1245.1(d)(1)(ii) ignored fundamental principles of statutory analysis and Congressional intent. The Fifth Circuit's decision substitutes its preferred readings of INA §§ 245(c)(2) and (k)(2)(A), 8 U.S.C. §§ 1255(c)(2) and (k)(2)(A) and 8 C.F.R. § 1245.1(d)(1)(ii) for USCIS's rational interpretations

of the same provisions and does not acknowledge the irrational outcomes that result. For example, although "lawful immigration status" includes a person holding lawful permanent residence status, it is unclear why these aliens need the benefits of INA § 245(k), 8 U.S.C. § 1255(k). Moreover, USCIS has long held that persons already in valid LPR status cannot file for adjustment in the U.S.

Neither USDHS nor EOIR has defined the term of art "lawful status," much less explained if and how it differs from "lawful immigration status" in INA § 245(c), 8 U.S.C. § 1255(c). The only "rules" aliens and employers can remotely rely upon for guidance are the USCIS memoranda. If the reasoning of Respondent and the Fifth Circuit were indeed correct, then USCIS can easily thwart the strictures and spirit of the Neufeld memo by denying I-485s and placing aliens in removal proceedings where USICE can then argue for pretermission. Respondent has yet to enunciate any logical reason or any legitimate interest he has in allowing different federal agencies to discriminate among adjustment applicants in this fashion.

Since Congress wrote INA § 245(k), 8 U.S.C. § 1255(k) using the phrase "lawful status" after it created the concept of "period of stay authorized by the Attorney General" in 1996 and after the regulation defining "lawful immigration status" had been in effect for years, the two terms of art

cannot be equivalent. The Fifth Circuit's finding on this point must be overturned.

3. All time an adjustment applicant is not in lawful status due to technical reasons or through no fault of his/her own does not count toward the 180-day time limit in INA § 245(k), 8 U.S.C. § 1255(k).

The Neufeld memo instructs USCIS employees that although aliens with properly filed extension or change of status requests may have violated their lawful immigration status "for technical reasons," it unequivocally states that technical violations or violations incurred "through no fault of the applicant" do not invoke INA § 245(c)(2), 8 U.S.C. § 1255(c)(2). Thus, these periods of unlawful status do *not* count towards the 180-day period in INA § 245(k), 8 U.S.C. § 1255(k). In essence, the Neufeld memo *confirms* that USCIS wrongly denied Petitioner's I-485 in 2005 and supports Petitioner's claim that he was indeed eligible for adjustment ab initiō.

Respondent has argued that since USCIS ultimately denied Petitioner's I-129, the technical violation/no fault exceptions in INA § 245(c)(2), 8 U.S.C. § 1255(c)(2) defined by 8 C.F.R. § 245.1(d)(2) did not apply to him. Neither the regulation nor the Neufeld memo requires or support the contention that the I-129 must be approved for the exceptions to apply.

Respondent's position is logically untenable. He has strenuously argued that the approval of an I-129 after the expiration of the prior I-94 card retroactively confers "lawful immigration status" to the alien for the entire time the I-129 was pending with USCIS. Assuming this is true, only aliens whose I-129 requests are ultimately denied would ever need to invoke the exceptions in the regulation. As the Neufeld memo implies, 8 C.F.R. § 245.1(d)(2) and INA §§ 245(c)(2) and (k), 8 U.S.C. §§ 1255(c)(2) and (k) are designed to work together to protect aliens in a period of authorized stay caused by USCIS delays from future adverse consequences.

CONCLUSION

For all the reasons stated herein, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner

March 2011

No. _____

In The

Supreme Court Of The United States

SYED TALHA BOKHARI,
Petitioner,

v.

ERIC H. HOLDER, JR.,
ATTORNEY GENERAL OF THE UNITED STATES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX

APPENDIX A

Opinion, United States Court of Appeals for the Fifth Circuit, September 29, 2010

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[file stamp]
United States Court of Appeals
Fifth Circuit
F I L E D
September 29, 2010
Lyle W. Cayce
Clerk

No. 09-60538

SYED TALHA BOKHARI,

Petitioner

v.

ERIC H. HOLDER, JR., U. S. ATTORNEY GENERAL,

Respondent

Petition for Review of an Order of
the Board of Immigration Appeals

Before JOLLY, DeMOSS, and DENNIS, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

On December 29, 2006, the Department of Homeland Security ("DHS") commenced removal proceedings against Syed Talha Bokhari, a native and citizen of Pakistan who entered the United States as a nonimmigrant visitor. Bokhari conceded his removability, but sought adjustment of his status from a nonimmigrant worker to a permanent resident. The Immigration Judge ("IJ") determined that Bokhari was ineligible for adjustment of status, because he had failed to maintain lawful status in this country for more than 180 days. Bokhari appealed to the Board of Immigration Appeals ("BIA"), and the BIA affirmed the IJ. Bokhari now petitions this court for a review of the BIA's decision. Bokhari argues that, because he was authorized to work in the United States, it

necessarily follows that he was authorized to be in the United States, and he thus was not in unlawful status for more than 180 days. He therefore contends that he is eligible for an adjustment of status, and that the BIA and IJ erred by not reaching the merits of his application to adjust to permanent resident status. We disagree. Finding no error, we DENY Bokhari's petition for review of the BIA's decision.

I.

Bokhari entered the United States on April 9, 2001, as a B-2 nonimmigrant visitor. His B-2 status was twice extended, rendering his presence lawful in the United States until October 9, 2002. His status changed on June 11, 2002, to a L-1A nonimmigrant worker for Syed T. Enterprises Inc. ("Syed"). Syed is a subsidiary of Mir Motors, the Pakistan-based company owned by Bokhari. Bokhari's counsel stated that, at the time of oral argument, Bokhari was Syed's sole shareholder, and sole employee.

On June 9, 2003, one day before Bokhari's approved L-1A status expired, Syed, on behalf of Bokhari, filed form I-129, seeking an extension of Bokhari's L-1A status. The I-129 application was denied on March 19, 2004. On April 19, Syed appealed, but the appeal was denied on September 2, 2005.

In the meantime, on June 8, 2004, Syed had filed an I-140 form, seeking permanent residence for Bokhari. Simultaneously, Bokhari, acting individually, filed an I-485 application for adjustment to permanent resident status. The I-140 application for permanent resident status was approved more than a year later, on July 11, 2005. Bokhari's I-485 application, however, was later denied on September 20, because he had failed, for more than 180 days before filing the application, to maintain lawful immigration status. DHS commenced removal proceedings against Bokhari on December 29, 2006.

*3

II.

In the proceedings below, Bokhari conceded removability, but claimed instead that he was eligible to have his I-485 application renewed. On August 17, 2007, the IJ issued her decision, finding that Bokhari's lawful immigration status ended on June 10, 2003, when his one-year term of approved L-1A status ended. She also found that Bokhari had not filed his application for adjustment of status until June 8, 2004, nearly one year after his lawful immigration status expired. Accordingly, the IJ pretermitted addressing his application for adjustment for status. Bokhari appealed the IJ's decision to the BIA.

The BIA upheld the IJ's decision on June 17, 2009. Bokhari argued that the employment authorization accompanying Syed's I-129 application granted him lawful immigration status. The government, while conceding that Bokhari had proper authorization to work, argued that work authorization does not itself also provide or determine lawful immigration status. The BIA agreed with the government's position. The BIA further concluded that lawful status derives from a grant or extension of status, and not from a pending application. Bokhari filed this petition for review.

III.

Bokhari contends the BIA erred in upholding the IJ's decision to pretermit deciding Bokhari's

application for adjustment of status.[1] He argues that the BIA erred in its interpretation and application of the relevant regulations and statutes. We have jurisdiction over these claims, as they present "constitutional claims or questions of law." 8 U.S.C. § 1252(a)(2)(D); *see Mai v. Gonzales*, 473 F.3d 162, 164 (5th Cir. 2006). When considering a petition for review, we review

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the BIA's legal conclusions *de novo*. *Singh v. Gonzales*, 436 F.3d 484, 487 (5th Cir.2006) (footnotes and citations omitted).[2]

Given the narrow nature of the question presented, it is worthwhile to emphasize several issues on which the parties agree: Bokhari is removable; was originally granted lawful admission to the country as a nonimmigrant visitor, and remained lawfully present as a nonimmigrant worker until June 10, 2003; and was authorized to

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[1] We do not have jurisdiction to review DHS's discretionary decision to deny Bokhari's I-485 application to adjust status. *See* 8 U.S.C. § 1252(a)(2)(B)(I).

[2] The parties dispute whether the BIA's interpretation was reasonable, and thus entitled to *Chevron* deference. We do not decide this issue, as the statute is unambiguous, and *Chevron* applies only when a statute is ambiguous. *See Singh*, 436 F.3d at 487. Similarly, we do not determine whether Bokhari is entitled to lenity, since lenity is applied only when there are "lingering ambiguities" to be resolved. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987).

work for Syed after June 10, for up to 240 days, during the pendency of Syed's I-129 application. The sole issue before us, therefore, is whether Bokhari was in unlawful immigration status for more than 180 days, and is thus ineligible to have his status adjusted. In making this determination, the key question is whether Syed's I-129 application for an extension of Bokhari's status gave him lawful immigration status.

Bokhari, relying heavily on *El Badrawi v. DHS*, argues that the automatic employment authorization that, under 8 C.F.R. § 274a.12(b)(20), accompanied his employer's, i.e., Syed's, I-129 application seeking an extension of his nonimmigrant status, logically gave him lawful immigration status. *See* 579 F. Supp. 2d 249, 276-77 (D. Conn. 2008) (holding that employment authorization under 8 C.F.R. § 274a.12(b)(20) results in lawful status). He thus contends that his status was lawful until March 19, 2004, when DHS denied the I-129 extension request. Thus, he contends, when he sought adjustment of his status on June 4, 2004, he had not been in unlawful status for more than 180 days, qualifying him as eligible for the status adjustment under 8 U.S.C. § 1255(k)(2)(a).

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DHS argues that Bokhari is ineligible to have his status adjusted because he failed to maintain lawful status in this country from June 10, 2003, until June 8, 2004, a period well in excess

of 180 days. *See* 8 U.S.C. § 1255(k)(2)(a). DHS acknowledges that, during this period of time, Bokhari was permitted to work for Syed under 8 C.F.R. § 274a.12(b)(20), but contends that employment authorization is not a grant of, nor is tantamount to, lawful immigration status for the authorized employee; each is a separate and independent consideration. DHS further contends that *In re Teberen*, 15 I. & N. Dec. 689 (BIA 1976), made clear that an extension application, standing alone, does not confer lawful status.

Although it is true that Bokhari meets the three statutory eligibility requirements of 8 U.S.C. § 1255(a), that is not the end of the analysis.[3] Section 1255(c)(2) further provides that Bokhari is not entitled to the adjustment of his status if he was "in unlawful immigration status on the date of filing the application for adjustment of status or . . . failed (other than through no fault of his own or for technical reasons) to maintain continuously a lawful status since entry into the United States." Section 1255(c)(2)'s requirements are excused, however, if Bokhari, following his "lawful admission has not, for an aggregate period exceeding 180 days failed to maintain, continuously, a lawful status." 8 U.S.C. § 1255(k)(2)(a).

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[3] An alien is statutorily eligible for relief from removal through adjustment of status if "(1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed." 8 U.S.C. § 1255(a).

"Lawful immigration status," as the term is used in § 1255(c)(2), is granted nonimmigrants "whose initial period of admission has not expired or whose nonimmigrant status has been extended. . . ." 8 C.F.R. § 1245.1(d)(1)(ii). Bokhari was granted L-1A status on June 11, 2002, allowing him to work temporarily in the United States for Syed (a legally related entity of Mir Motors, the

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international company Bokhari owns), "in a capacity that [was] managerial [or] executive." 8 U.S.C. § 1101(a)(15)(L). Thus, he had lawful immigration status through June 10, 2003. *See* 8 C.F.R. § 1245.1(d)(1)(ii). We must decide, however, whether he failed to maintain his lawful status for more than 180 days thereafter; such failure would make him ineligible for the I-145 [sic] permanent residence adjustment he sought on June 8, 2004. See 8 U.S.C. §§ 1255(c)(2), (k)(2)(a).

As we have said, it is undisputed that, while waiting for the adjudication of Syed's I-129 extension application, Bokhari was automatically authorized to continue his employment with Syed for "a period not to exceed 240 days beginning on the date of the expiration of [his] authorized period of stay." *See* 8 C.F.R. § 274a.12(b)(20). The regulation further provides that such authorization "automatically terminate[s] upon notification of" DHS's decision denying the request, which, in this case, occurred on March 19, 2004, cutting short the 240-day period. *See id.* The sole focus of our review,

however, is whether Bokhari's employment authorization, which he received automatically upon the filing of Syed's I-129 application for the extension of his status, gave him legal immigration status, as defined in 8 C.F.R. § 1245.1(d)(1)(ii).

As DHS asserts, employment authorization and lawful immigration status are two separate considerations, presenting issues independent of each other. We have recognized this distinction in the context of a direct criminal appeal. *United States v. Flores*, 404 F.3d 320, 327-28 (5th Cir. 2005). In *Flores*, we held "an alien may be temporarily granted a stay of removal and be permitted to work during that stay, but still be considered illegal[]. . . ." *Id.* (internal citations and quotations omitted). Although *Flores* is not precisely our case, we find it persuasive. Moreover, under *In re Teberen*, a *grant* of an extension request confers lawful status, not the filing of the request. 15 I. & N. Dec. 689, 690. *El Badrawi* found *In re Teberen* inapplicable because the latter "was decided in

1976—15 years before the INS adopted" 8 C.F.R. § 274a.12(b)(20). 579 F. Supp. 2d at 276-77. We, however, see no basis to refrain from applying *In re Teberen*. Section 274a.12(b)(20), by its plain language, addresses employment authorization only, and thus does not address an employee's immigration status.

IV.

We thus hold that the employment authorization provided to Bokhari under 8 C.F.R. § 274a.12(b)(20) did not provide him with lawful immigration status. We further hold Bokhari was in unlawful immigration status, as defined in 8 C.F.R. § 1245.1(d)(1)(ii), after June 10, 2003, and he unlawfully remained in the United States for more than 180 days thereafter. We therefore hold that because Bokhari failed to maintain lawful status, he was ineligible to have his status adjusted under 8 U.S.C. §§ 1255(c)(2), (k)(2)(a). Bokhari's petition for review of the order of the BIA pretermitting the question of Bokhari's application and ordering him to depart the United States is therefore

DENIED.

APPENDIX B

Opinion, Board of Immigration Appeals, June 17, 2009

Decision of the Board of Immigration Appeals

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A098 380 789 -Houston, TX Date:[date stamp]
JUN 1 7 2009

In re: SYED TALHA BOKHARI

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jonathan H. Lamb, Esquire

ON BEHALF OF DHS: Gerrie Zhang
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(l)(C)(i), I&N Act [8 U.S.C. § 1227(a)(l)(C)(i)] – Nonimmigrant - violated conditions of status

APPLICATION: Adjustment of status

The respondent timely appeals the Immigration Judge's August 17, 2007, decision denying the respondent's application for

adjustment of status under section 245(a) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1255(a). The respondent argues on appeal that the Immigration Judge erred in denying his application. The Department of Homeland Security (DHS) argues that the Immigration Judge's decision is correct and should be summarily affirmed.

On June 9, 2003, the respondent's employer filed a request to extend the respondent's L-1 nonimmigrant visa. On June 10, 2003, the respondent's nonimmigrant status expired. The respondent's employer's extension request was denied by the DHS on March 19, 2004. On June 8, 2004, the respondent filed an application for adjustment of status. The respondent argues on appeal that he remains eligible for adjustment of status under section 245(a) despite the fact that he did not have lawful status at the time he filed his application, because he is eligible for a waiver of section 245(c)(2), which precludes applications from aliens who failed to maintain continuous lawful status, under section 245(k).

In order for the respondent to establish eligibility for a section 245(k) waiver, he must establish that he has not failed to maintain continuous lawful status for an aggregate period exceeding 180days. 8 U.S.C. § 1255(k)(2)(A). The respondent argues that his lawful status did not end until March 19, 2004, when the DHS denied his employer's extension request. We disagree. Expiration or revocation of status puts a nonimmigrant out of status, and the alien remains

out of status unless or until some adjudication restores status. *See generally Matter of Teberen,* 15 I&N Dec. 689 (BIA 1976) (finding that an alien is removable as an "overstay" when the authorized stay expires unless the alien receives a grant of an extension and rejecting argument that an alien is not deportable until

he receives a denial of the extension request).[1] We further find the respondent's argument that his continued work authorization during the pendency of his extension request confers "lawful status" unpersuasive. While we recognize that the governing regulations provide aliens limited work authorization during the pendency of their extension request, their "status" remains unaffected. 8 C.F.R. § 1274a.12(b)(20) (providing that aliens may continue employment for up to 240 days after the expiration of their stay if a timely application for an extension of such stay was filed). Lawfulness of status stems from a grant or extension of status, not the mere fact that the alien is an applicant for the privilege of extending status that has already expired. In this regard we highlight that the regulations define "lawful status" for aliens admitted in nonimmigrant status as an

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[1] *See also* Memo, David Neufeld, Acting Associate Director, Domestic Operations, USCIS, *Applicability of Section 245(k) to Certain Employment-Based Adjustment of Status Application* [sic] *filed under Section 245(a) of the Immigration and Nationality Act,* July 14,2008.

alien "whose initial period of admission has not expired or whose nonimmigrant status has been extended." 8 C.F.R. § 1245.1(d)(ii). *See also generally Matter of Rotimi*, 24 I&N Dec. 567 (BIA 2008).

Based on the foregoing, we conclude that the respondent's lawful status expired on June 10, 2003. Inasmuch as the respondent failed to maintain continuous lawful status for more than 180 days prior to filing his adjustment of status application on June 8, 2004, we find that the respondent is ineligible for a waiver under section 245(k). Consequently, we agree with the Immigration Judge's pretermission of the respondent's application for adjustment of status due to the fact that the respondent was in unlawful immigration status on the date of filing his application. 8 C.F.R. § 1255(c)(2).

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the respondent is permitted to voluntarily depart the United States, without expense to the Government, within 60 days from the date of this order or any extension beyond that time as may be granted by the Department of Homeland Security ("DHS"). *See* section 240B(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229c(b); see also 8 C.F.R. §§ 1240.26(c), (f). In the event the respondent fails to voluntarily depart the

United States, the respondent shall be removed as provided in the Immigration Judge's order.

NOTICE: If the respondent fails to voluntarily depart the United States within the time period specified, or any extensions granted by the DHS, the respondent shall be subject to a civil penalty as provided by the regulations and the statute and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Act. *See* section 240B(d) of the Act.

WARNING: If the respondent files a motion to reopen or reconsider prior to the expiration of the voluntary departure period set forth above, the grant of voluntary departure is automatically terminated; the period allowed for voluntary departureis not stayed, tolled, or extended. If the grant

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of voluntary departure is automatically terminated upon the filing of a motion, the penalties for failure to depart under section 240B(d) of the Act shall not apply. See Voluntary Departure: Effect of a Motion To Reopen or Reconsider or a Petition for Review, 73 Fed. Reg. 76,927, 937-38 (Dec. 18, 2008) (to be codified at 8 C.F.R. §§ 1240.26(c)(3)(iii), (e)(1)).

WARNING: If, prior to departing the United States, the respondent files any judicial challenge to this

administratively final order, such as a petition for review pursuant to section 242 of the Act, 8U.S.C. § 1252, the grant of voluntary departure is automatically terminated, and the alternate order of removal shall immediately take effect. However, if the respondent files a petition for review and then departs the United States within 30 days of such filing, the respondent will not be deemed to have departed under an order of removal if the alien provides to the DHS such evidence of his or her departure that the Immigration and Customs Enforcement Field Office Director of the DHS may require and provides evidence DHS deems sufficient that he or she has remained outside of the United States. The penalties for failure to depart under section 240B(d) of the Act shall not apply to an alien who files a petition for review, notwithstanding any period of time that he or she remains in the United States while the petition for review is pending. *See* 73 Fed. Reg. At 76938 (to be codified at 8 C.F.R. § 1240.26(i)).

[illegible signature]

FOR THE BOARD

APPENDIX C

Oral Decision, United States Department of Justice, Executive Office for Immigration Review, United States Immigration Court, Houston, Texas, (Immigration Judge Yates), August 17, 2007

All errors in original transcription

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Houston, Texas

File A 98 380 789	Date of Decision
In the Matter of	August 17, 2007
SYED TALHA BOKHARI,	) IN
	) REMOVAL
Respondent	)PROCEEDINGS

CHARGE: 237(a)(1)(C)(i) Immigration and Nationality Act, for failure to maintain and comply with the conditions of the change of status.

APPLICATION: Adjustment of status under 245.

ON BEHALF OF THE RESPONDENT:	ON BEHALF OF THE DEPARTMENT OF HOMELAND SECURITY:
Jonathan Lamb, Esquire	Gerrie W. Zhang, Esquire

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent in this case in a native and citizen of Pakistan. He is admitted to the United States at Chicago, Illinois, on April the 9th, of 2001 as a B2 visitor. His status was changed to that of Lla on June 11th, 2002 and valid until June the 10th, 2003.

The respondent admitted allegations one through five after the adjustment of the allegations four and five. Allegation four indicated that the respondent should change to that of an Lib on June 11th, 2002 and was valid until June the

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10th, 2003. Allegations number five was amended to allege that the respondent's Lib status expired on June 10th, 2003, when he filed for an extension of that status on June 9th, 2003, but this request was denied on March 19, 2004.

The Court found that all of the allegations as amended were correct or true and the respondent conceded that the charge under Section 237(a) (1) (C) (i) was true, and the Court sustained that charge on February 7th, 2007.

The respondent eventually requested that he be allowed to adjust his status and the following documents were submitted as exhibits, mark as exhibit as followed: Exhibit 1 is charging document, Exhibit 2 is the respondent suggested application of the 1-485, adjustment to 1-140 petition for an alien worker. Exhibit 3 is the 1-140 and Exhibit 4 is the respondent's exhibits offered in support of his adjusted application for permanent residence status with the attachments one through ten.

Exhibit 5 is the respondent's additional exhibit's offered in support of his application for adjustment numbered 11(b)(14) and Exhibit 6 is the governments motion to pre-term and decline his application for adjustment of status. Exhibit 7 is an unopposed motion for an extension of time to respond to the motion of the pre-term. And Exhibit 8 is the respondent's opposition to the governments motion to pre-term of the respondent's application for adjustment

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of status.[1] Exhibit 9 is the governments response to the respondent's opposition to the respondent's motion to pre-term that it is not a fabrication for adjustment of status.

In this particular case the respondent is seeking to adjust his status through the 1-140, and the government in Exhibit 6 (indiscernible) the respondent eligible to apply for adjustment of status. The government points out that on June 10th, 2003, the respondent's non-immigrant status expired and his request for an extension for that status is denied on March 19th, 2004. On June 8th, 2004, the respondent did file for an adjustment of status and the government's position is that the respondent was in an unlawful status at that time

[1] The Court wasn't able to locate a copy of the respondent's opposition , although it indicates a copy that the Court eventually was able to get from the respondent and he had actually on June 21, with the Court, 2007.

under Section 245(c) of the Act, the respondent is ineligible to adjust status under Section 245(a) of the Act unless he is covered by the exception to 245 in Section 245(k), which provides that lawful immigration status is defined by regulation for an aliens admitted is on immigrants for Section 245(c)(2) of the Act whose admission has not expired or whose not immigrant status has not been extended. 8 C.F.R. Section 245.1(DII). Section 245(b) of the Act provides an exception to Section 245(c) (2), a certain employment based immigrant, Section 245(k) allows for the adjustment of status as an employment based immigrant under Section 245(a). Unless the alien has failed to maintain

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continuous lawful status for a period of 180 days.

A review of the series of the events in this particular case indicate that the respondent ended on June 10th, 2003 and he filed his application for adjustment of status nearly one year thereafter, on June 8th, 2004, and thus the respondent had been in unlawful status for nearly four years. It appears that the respondent is ineligible to adjust his status of the 245(a) of the Act. The respondent argued that he was not in unlawful status or that he falls under the exception bases upon the fact that he did file the request to extend his time and after the denial he appealed the denial. The respondent clearly is ineligible to adjust his status as he was

not in lawful status at the time he file for adjustment of status.

Then the Court finds that the governments argument is persuade and orders based upon the finding that the respondent's application for status under the 1-140(b), pretermitted as the respondent is not eligible if he is not in lawful status. The respondent further has requested that he be granted voluntary departure and in order to qualify for voluntary at this phase of the proceeding the respondent would have been required present in the United States for at lease the Notice to Appear was issued. He would be required to be a person with good moral character for five years and not be an aggravated felon and he must (indiscernible) that he has the means to depart and intends to do so. He must post a bond within five days and the maximum that

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the Court could grant would be 50 days until voluntary departure. The government does not oppose the respondent's application for voluntary departure in the alternative the respondent has indicated that he seeks this in the alternative but in turns to reserve the appeal of the motion to return it. Thus the Court it is so ordered that the respondent's request for voluntary departure for 60 days, the respondent is granted until October 16th, 2007, to depart the United States. Should the respondent fail to depart on or before the voluntary

departure date then the voluntary departure order will become a removal and the respondent will be removed to his native country of Pakistan.

In addition, the respondent has applied for a voluntary departure bond of $500. That completes the proceeding and order of the immigration judge.

CLAREASE RANKIN YATES
Immigration Judge

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APPENDIX D

Order, United States Court of Appeals for the Fifth Circuit, December 15, 2010

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 09-60538

SYED TALHA BOKHARI,

Petitioner

v.

ERIC H. HOLDER, JR., U. S. ATTORNEY GENERAL,

Respondent

Petition for Review of an Order of the Board of Immigration Appeals

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ON PETITION FOR REHEARING [ink blots]

Before JOLLY, DeMOSS, and DENNIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED [handwritten in ink]

ENTERED FOR THE COURT:

/s/ E. Grady Jolly
United States Circuit Judge

APPENDIX E

Memo, Neufeld, Acting Associate Director, Domestic Operations, USCIS, "Applicability of Section 245(k) to Certain Employment-Based Adjustment of Status Applications Filed Under Section 245(a) of the Immigration and Nationality Act " (July 14, 2008)

U.S. Department of Homeland Security
20 Massachusetts Ave. NW
Washington, DC 20529

[USCIS logo] **U.S. Citizenship and Immigration Services**

HQDOMO 70/23.1-P AD06-07

Memorandum

TO: Field Leadership

FROM: Donald Neufeld /s/
Acting Associate Director, Domestic Operations

DATE: July 14, 2008

SUBJECT: Applicability of Section 245(k) to Certain Employment-Based Adjustment of Status Applications filed under Section 245(a) of the Immigration and Nationality Act

Revisions to *Adjudicator's Field Manual* (AFM) Chapter 23.5(d) (AFM Update AD06-47)

1. Purpose

This memorandum clarifies how section 245(k) of the Immigration and Nationality Act (the Act) renders certain section 245(c) bars to adjustment of status under section 245(a) inapplicable to certain employment-based adjustment of status applicants.

2. **Background**

In general, Section 245(a) allows an admissible alien who was inspected and admitted or paroled into the United States to apply for permanent resident status from within the United States if the alien is the beneficiary of an approved immigrant visa petition and has an immigrant visa number immediately available.

Section 245(c) establishes eight (8) bars to adjustment under Section 245(a). For certain employment-based adjustment applicants, section 245(k) grants relief from three (3) of those bars: sections 245(c)(2), (c)(7) and (c)(8). Section 245(k), however, does not provide an exemption from any other basis of ineligibility, such as entry without inspection or any ground of inadmissibility.

3. **Field Guidance and AFM Update**

The adjudicator is directed to comply with the following guidance. The Adjudicator's Field Manual (AFM) is revised to add a new section (d) to subchapter 23.5, "Adjustment of Status under Section 245 of the INA." Current sections (d) through (k) proceed thereafter and should be renumbered accordingly.

(d) Section 245(k) of the Act: Exemptions to the 245(c)(2), (c)(7) and (c)(8) Bars to Adjustment for Certain Employment-Based Adjustment of Status Applicants.

(1) **General Provisions.** Section 245(k) can render the normal bars to adjustment of status found in section 245(c)(2), (c)(7), and (c)(8) inapplicable to certain employment-based adjustment of status applicants who, since their last lawful admission to the United States have not, for an aggregate period of more than 180 days:

(A) failed to maintain, continuously, a lawful status;
(B) engaged in unauthorized employment; or
(C) otherwise violated the terms and conditions of his or her admission.

(2) **Applicability.** The following classes of employment-based adjustment of status applicants under section 245(a) are eligible for relief under 245(k):

(A) An alien who is present in the United States pursuant to a lawful admission and whose adjustment of status application is based on an approved immigrant petition for them as the beneficiary in one of the following classifications:

- EB-1: aliens of extraordinary ability, outstanding professors and researchers, and certain multinational managers and executives;
- EB-2: aliens who are members of the professions holding advanced degrees or aliens of exceptional ability;
- EB-3: skilled workers, professionals, and other workers; or
- EB-4: religious workers described in section 101(a)(27)(C) of the Act only.

Other employment-based immigrant classifications and other immigrant classifications are not a basis for consideration under section 245(k).

(B) An eligible derivative of an alien described in (A) may benefit from section 245(k) in his or her own right if he or she has failed to maintain continuously a lawful status, worked without authorization, or otherwise violated the terms and conditions of his or her admission for an aggregate of 180 days or less pursuant to a lawful admission.

(3) **Application Process**. An alien must properly file an adjustment of status application under section 245(a) in accordance with 8 CFR 245.2 and 103.2. An applicant invoking 245(k) is not required to submit additional application forms or payment of a penalty surcharge. Thus, it is the responsibility of USCIS to determine section 245(k) applicability based on the evidence submitted in support of the adjustment of status application. To the extent evidence is deficient or absent, USCIS

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may issue a request(s) for evidence or notice of intent to deny asking for specific evidence in support of eligibility for relief under section 245(k).

(4) Counting against the 180 days timeframe in (d)(1).

(A) General Guidelines. If the adjudicator determines that an employment-based adjustment of status applicant described in (d)(2) above is subject to any of the bars to adjustment of status set forth in Sections 245(c)(2), (c)(7), or (c)(8), then the adjudicator must determine whether the aggregate period in which the alien failed to

continuously maintain lawful status, worked without authorization, or otherwise violated the terms and conditions of the alien's admission since the date of alien's last lawful admission to the United States is 180 days or less.

The guidance below describes the periods of time to be examined for purposes of calculating time against the 180-day period.

- The adjudicator must only examine the period from the date of the alien's last lawful admission to the United States and must not count violations that occurred before the alien's last lawful admission.

- An alien, however, who entered the United States pursuant to an advance parole document is not "lawfully admitted," because the parole is not a final act with respect to admission. Thus, reentry based on a parole or advance parole does not start the clock over for the purpose of section 245(k).

- An alien may be subject to more than one bar or violation described in section 245(k)(2) at the same time. For example, an alien in B-2 status who worked without authorization will also have violated a lawful status and failed to maintain continuously a lawful status. USCIS reads the phrase "aggregate period exceeding 180 days" in section 245(k)(2) to refer to the

total of all three types of violations rather than permit up to 180 days of each type of violation. Accordingly, the aggregate 180 day period must be calculated by adding together any and all days in which there is one or more of the violations, and each day in which one or more of these violations existed must be counted as one day. If USCIS reads section 245(k) to permit up to 180 days of each type of violation an alien could potentially accrue more than 180 total days of violations and remain eligible for adjustment of status. USCIS holds that the statute was not intended to permit such egregious violations.

(B) Engaged in Unauthorized Employment

(1) General. "Unauthorized employment" means any service or labor performed by an alien for an employer within the United States that is not authorized under 8 CFR 274a.12(a), (b), or (c) or exceeds the authorized period of employment. The filing of an adjustment of status application does not, in itself, authorize employment or excuse unauthorized employment, and accordingly the filing of an adjustment of status application will not stop the counting period of unauthorized

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employment. Therefore, all periods of unauthorized employment since the date of the alien's last lawful admission, including any periods after the filing of an application for adjustment of status, must be counted until the date of the adjudication of the pending adjustment of status application.

- With respect to engaging in unlawful employment, the count commences on the first date of the unauthorized employment and continues until the date the unauthorized employment ended, the date an employment authorization document (EAD) is approved, or the date the pending adjustment of status application is adjudicated.

- It is completely within the control of the alien as to whether he or she engages in employment without authorization and, as stated above, the filing of an application for adjustment of status does not automatically authorize employment in the United

States. Therefore, it is possible for an alien to accrue days of unauthorized employment against the 180 day period after the filing of the application for adjustment of status. To hold otherwise would not only reward an alien for engaging in unauthorized employment but it would also effectively eliminate the incentive and the need for an alien to maintain a valid employment authorization document in connection with the pending application for adjustment of status. Unlike an alien who has failed to maintain lawful nonimmigrant status, an alien who has worked without authorization may unilaterally avoid the accrual of additional days counted against such violation by simply terminating the unauthorized employment.

- An alien's engagement in unauthorized employment is dependent upon the existence of the alien's employment or employer-employee relationship rather than simply the number of days the alien actually works or claims to have worked. Each day an alien engaged in unauthorized employment must be counted against the 180-day period regardless of whether or not the alien unlawfully worked a few hours on a given day, a part-time schedule, or a full-time schedule with leave benefits

and weekend and holidays off. Absent evidence of interruptions in unauthorized employment, the adjudicator must consider each day since the date the unauthorized employment began as a day of unauthorized work regardless of the work schedule agreed to or maintained by the alien for the particular employer. For example, if an alien worked without authorization for four hours a day Monday through Friday throughout the month of April, all 30 days for that month must be counted as unauthorized employment.

- For periods in which it appears that the alien has engaged in unauthorized employment, the alien bears the burden of establishing that any such periods were authorized or that he or she did not in fact engage in

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unauthorized employment. In addition, an alien who works without authorization after filing for adjustment of status will not stop the

clock by departing the United States and re-entering pursuant to a valid advance parole document.

(2) Special Considerations. For purposes of section 245(c)(8) of the Act, an alien is not considered to be engaged in unauthorized employment while his or her properly filed adjustment of status application is pending final adjudication, if:

- The alien has obtained permission from USCIS to engage in employment based on his or her pending adjustment of status application and such authorization remains valid; or

- The alien had been granted employment authorization prior to the filing of the adjustment of status application and such authorization does not expire while the adjustment of status application is pending.

(C) Failed to Maintain a Lawful Status and/or Violated the Terms of a Nonimmigrant Visa.

(1) General. Expiration, revocation, or violation of status puts a nonimmigrant out of status, and the alien remains out of status until some adjudication restores status or the alien departs the United States.

In most cases, the 180-day counting period commences on the date the alien's status expires, is revoked, or is violated following

the alien's most recent admission. In addition, with the exception of a dual intent nonimmigrant, a nonimmigrant is only required to maintain his or her nonimmigrant status until the time he or she properly files an adjustment of status application with USCIS, because most nonimmigrants who apply for adjustment of status are presumed to be intending immigrants and are no longer eligible to maintain a nonimmigrant status. Therefore, for purposes of the 180-day counting period, calculation of the number of days for failing to maintain status or violating a nonimmigrant visa will stop as of the date USCIS receives a properly filed adjustment of status application.

Notwithstanding, a properly filed adjustment of status application, in and of itself, does not accord lawful status or cure any violation of a nonimmigrant visa. For example, if an alien applied for adjustment of status three days prior to the expiration of his or her nonimmigrant status and the adjustment of status application was eventually denied, the alien will not be considered to be in lawful status after the expiration of the nonimmigrant status. Consequently, if the same alien files a second application for adjustment of status, the period after which the nonimmigrant status expired and during which the first adjustment of status application was

pending counts against the 180-day period when considering

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eligibility for relief under 245(k) in the adjudication of the second adjustment of status application.

(2) Special Considerations. The adjudicator must consider the following when calculating the number of days an alien has failed to maintain a lawful status or violated the terms of a nonimmigrant visa.

- The regulations define "lawful immigration status" at 8 CFR 245.1(d)(1). In examining any period where an application for extension of stay (EOS) or change of status (COS) was ultimately approved, the period during which the EOS or COS had been pending would be considered, in retrospect, a period in which the alien was in a lawful nonimmigrant status regardless of whether the EOS or COS application was timely or untimely filed. The period would not be disqualifying for section 245(c) purposes,

and the period would not count against any 180-day period under section 245(k).

- The period during which an alien has a pending EOS, COS, or adjustment of status application does not constitute, in and of itself, a period in which the alien is in a lawful "status."

- A period of unlawful status found to result only from a "technical violation" or through no fault of the applicant, as described in 8 CFR 245.1(d)(2), does not invoke the 245(c)(2) bar. Thus, such period does not count against the 180-day period.

- An alien who complies with all the terms and conditions of his or her nonimmigrant status does not violate the terms of such status merely by properly filing an adjustment of status application, provided the filing occurred before the alien's nonimmigrant status expired.

- An F (student) or J (exchange visitor) nonimmigrant is considered in "status" for such authorized period of time before and after completion of his or her educational objective or program in accordance with 8 CFR 214.2(f) and 8 CFR 214.2(j), respectively, provided that the F or J nonimmigrant has not violated the terms and conditions of his or her status.

- A reinstatement of F status under 8 CFR 214.2(f) or J status under 22 CFR 62.45 cures time out of or in violation of status only for the particular period of time covered by the reinstatement, so that such period does not count against the 180-day period.

(5) **Effect of 245(k) Exemption**. A determination of eligibility under section 245(k) renders inapplicable the normal bars to adjustment found in section 245(c)(2), (c)(7),

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and (c)(8). Section 245(k), however, does not provide an exemption from any other basis of ineligibility, such as entry without inspection or any ground of inadmissibility.

4. Use

This memorandum is intended solely for the training and guidance of USCIS personnel in performing their duties relative to the adjudication of applications for adjustment of status. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or

procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

5. **Contact Information**

Questions regarding this memorandum and USCIS policy regarding section 245(k) of the Act may be directed to Carol Vernon, Office of Policy and Strategy, Rishiram "Rishi" Lekhram, Service Center Operations, and Vinay Singla, Field Operations, through appropriate supervisory channels.

Distribution List: Regional Directors
District Directors
Field Office Directors
Service Center Directors
National Benefits Center Director

APPENDIX F

Relevant Statutory and Regulatory Provisions

INA § 212(a)(9)(B), 8 U.S.C. § 1182(a)(9)(B)

Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

....

(9)

....

(B) Aliens unlawfully present

(i) In general Any alien (other than an alien lawfully admitted for permanent residence) who—

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to section 1254a (e) [3] of this title) prior to the commencement of proceedings under section 1225 (b)(1) of this title or section 1229a of this title, and again seeks admission within 3 years of the date of such alien's departure or removal, or

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States,

is inadmissible.

(ii) Construction of unlawful presence For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.

(iii) Exceptions

(I) Minors No period of time in which an alien is under 18 years of age shall be taken into account in determining the period of unlawful presence in the United States under clause (i).

(II) Asylees No period of time in which an alien has a bona fide application for asylum pending under section 1158 of this title shall be taken into account in determining the period of unlawful presence in the United

States under clause (i) unless the alien during such period was employed without authorization in the United States.

(III) Family unity No period of time in which the alien is a beneficiary of family unity protection pursuant to section 301 of the Immigration Act of 1990 shall be taken into account in determining the period of unlawful presence in the United States under clause (i).

(IV) Battered women and children Clause (i) shall not apply to an alien who would be described in paragraph (6)(A)(ii) if "violation of the terms of the alien's nonimmigrant visa" were substituted for "unlawful entry into the United States" in subclause (III) of that paragraph.

(V) Victims of a severe form of trafficking in persons Clause (i) shall not apply to an alien who demonstrates that the severe form of trafficking (as that term is defined in section 7102 of title 22) was at least one central reason for the alien's unlawful presence in the United States.

(iv) Tolling for good cause In the case of an alien who—

(I) has been lawfully admitted or paroled into the United States,

(II) has filed a nonfrivolous application for a change or extension of status before the date of expiration of the period of stay authorized by the Attorney General, and

(III) has not been employed without authorization in the United States before or during the pendency of such application, the calculation of the period of time specified in clause (i)(I) shall be tolled during the pendency of such application, but not to exceed 120 days.

(v) Waiver The Attorney General has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

INA § 237(a)(1)(C), 8 U.S.C. § 1227(a)(1)(C)

Deportable aliens

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

(1) Inadmissible at time of entry or of adjustment of status or violates status

....

(C) Violated nonimmigrant status or condition of entry

(i) Nonimmigrant status violators

Any alien who was admitted as a nonimmigrant and who has failed to maintain the nonimmigrant status in which the alien was admitted or to which it was changed under section 1258 of this title, or to comply with the conditions of any such status, is deportable.

(ii) Violators of conditions of entry

Any alien whom the Secretary of Health and Human Services certifies has failed to comply with terms, conditions, and controls that were imposed under section 1182 (g) of this title is deportable.

INA § 245, 8 U.S.C. § 1255

Adjustment of status of nonimmigrant to that of person admitted for permanent residence

(a) Status as person admitted for permanent residence on application and eligibility for immigrant visa

The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification as a VAWA self-petitioner may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if

(1) the alien makes an application for such adjustment,

(2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and

(3) an immigrant visa is immediately available to him at the time his application is filed.

....

(c) Alien crewmen, aliens continuing or accepting unauthorized employment, and aliens admitted in transit without visa

Other than an alien having an approved petition for classification as a VAWA self-petitioner,

subsection (a) of this section shall not be applicable to

(1) an alien crewman;

(2) subject to subsection (k) of this section, an alien (other than an immediate relative as defined in section 1151 (b) of this title or a special immigrant described in section 1101 (a)(27)(H), (I), (J), or (K) of this title) who hereafter continues in or accepts unauthorized employment prior to filing an application for adjustment of status or who is in unlawful immigration status on the date of filing the application for adjustment of status or who has failed (other than through no fault of his own or for technical reasons) to maintain continuously a lawful status since entry into the United States;

(3) any alien admitted in transit without visa under section 1182 (d)(4)(C) of this title;

(4) an alien (other than an immediate relative as defined in section 1151 (b) of this title) who was admitted as a nonimmigrant visitor without a visa under section 1182 (l) of this title or section 1187 of this title;

(5) an alien who was admitted as a nonimmigrant described in section 1101 (a)(15)(S) of this title,[1]

(6) an alien who is deportable under section 1227 (a)(4)(B) of this title;

(7) any alien who seeks adjustment of status to that of an immigrant under section 1153 (b) of this title and is not in a lawful nonimmigrant status; or

(8) any alien who was employed while the alien was an unauthorized alien, as defined in section 1324a (h)(3) of this title, or who has otherwise violated the terms of a nonimmigrant visa.

....

(i) Adjustment in status of certain aliens physically present in United States

(1) Notwithstanding the provisions of subsections (a) and (c) of this section, an alien physically present in the United States—

(A) who—

(i) entered the United States without inspection; or

(ii) is within one of the classes enumerated in subsection (c) of this section;

(B) who is the beneficiary (including a spouse or child of the principal alien, if eligible to receive a visa under section 1153 (d) of this title) of—

(i) a petition for classification under section 1154 of this title that was filed with the Attorney General on or before April 30, 2001; or

(ii) an application for a labor certification under section 1182 (a)(5)(A) of this title that was filed pursuant to the regulations of the Secretary of Labor on or before such date; and

(C) who, in the case of a beneficiary of a petition for classification, or an application for labor

certification, described in subparagraph (B) that was filed after January 14, 1998, is physically present in the United States on December 21, 2000;

may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence. The Attorney General may accept such application only if the alien remits with such application a sum equalling $1,000 as of the date of receipt of the application, but such sum shall not be required from a child under the age of seventeen, or an alien who is the spouse or unmarried child of an individual who obtained temporary or permanent resident status under section 1160 or 1255a of this title or section 202 of the Immigration Reform and Control Act of 1986 at any date, who—

(i) as of May 5, 1988, was the unmarried child or spouse of the individual who obtained temporary or permanent resident status under section 1160 or 1255a of this title or section 202 of the Immigration Reform and Control Act of 1986;

(ii) entered the United States before May 5, 1988, resided in the United States on May 5, 1988, and is not a lawful permanent resident; and

(iii) applied for benefits under section 301(a) of the Immigration Act of 1990. The sum specified herein shall be in addition to the fee normally required for the processing of an application under this section.

(2) Upon receipt of such an application and the sum hereby required, the Attorney General may adjust the status of the alien to that of an alien lawfully admitted for permanent residence if—

(A) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence; and

(B) an immigrant visa is immediately available to the alien at the time the application is filed.

(3)

(A) The portion of each application fee (not to exceed $200) that the Attorney General determines is required to process an application under this section and is remitted to the Attorney General pursuant to paragraphs (1) and (2) of this subsection shall be disposed of by the Attorney General as provided in subsections (m), (n), and (o) of section 1356 of this title.

(B) Any remaining portion of such fees remitted under such paragraphs shall be deposited by the Attorney General into the Breached Bond/Detention Fund established under section 1356 (r) of this title, except that in the case of fees attributable to applications for a beneficiary with respect to whom a petition for classification, or an application for labor certification, described in paragraph (1)(B) was filed after January 14, 1998, one-half of such remaining portion shall be deposited by the Attorney General into the Immigration Examinations Fee

Account established under section 1356 (m) of this title.

....

(k) Inapplicability of certain provisions for certain employment-based immigrants

An alien who is eligible to receive an immigrant visa under paragraph (1), (2), or (3) of section 1153 (b) of this title (or, in the case of an alien who is an immigrant described in section 1101 (a)(27)(C) of this title, under section 1153 (b)(4) of this title) may adjust status pursuant to subsection (a) of this section and notwithstanding subsection (c)(2), (c)(7), and (c)(8) of this section, if—

(1) the alien, on the date of filing an application for adjustment of status, is present in the United States pursuant to a lawful admission;

(2) the alien, subsequent to such lawful admission has not, for an aggregate period exceeding 180 days—

(A) failed to maintain, continuously, a lawful status;

(B) engaged in unauthorized employment; or

(C) otherwise violated the terms and conditions of the alien's admission.

8 C.F.R. § 245.1(d)

§ 245.1 Eligibility.

....

(d) *Definitions* —(1) *Lawful immigration status.* For purposes of section 245(c)(2) of the Act, the term "lawful immigration status" will only describe the immigration status of an individual who is:

(i) In lawful permanent resident status;

(ii) An alien admitted to the United States in nonimmigrant status as defined in section 101(a)(15) of the Act, whose initial period of admission has not expired or whose nonimmigrant status has been extended in accordance with part 214 of this chapter;

(iii) In refugee status under section 207 of the Act, such status not having been revoked;

(iv) In asylee status under section 208 of the Act, such status not having been revoked;

(v) In parole status which has not expired, been revoked or terminated; or

(vi) Eligible for the benefits of Public Law 101–238 (the Immigration Nursing Relief Act of 1989) and files an application for adjustment of status on or before October 17, 1991.

(2) *No fault of the applicant or for technical reasons.* The parenthetical phrase *other than*

through no fault of his or her own or for technical reasons shall be limited to:

(i) Inaction of another individual or organization designated by regulation to act on behalf of an individual and over whose actions the individual has no control, if the inaction is acknowledged by that individual or organization (as, for example, where a designated school official certified under §214.2(f) of this chapter or an exchange propram sponsor under §214.2(j) of this chapter did not provide required notification to the Service of continuation of status, or did not forward a request for continuation of status to the Service); or

(ii) A technical violation resulting from inaction of the Service (as for example, where an applicant establishes that he or she properly filed a timely request to maintain status and the Service has not yet acted on that request). An individual whose refugee or asylum status has expired through passage of time, but whose status has not been revoked, will be considered to have gone out of status for a technical reason.

(iii) A technical violation caused by the physical inability of the applicant to request an extension of nonimmigrant stay from the Service either in person

or by mail (as, for example, an individual who is hospitalized with an illness at the time nonimmigrant stay expires). The explanation of such a technical violation shall be accompanied by a letter explaining the circumstances from the hospital or attending physician.

(iv) A technical violation resulting from the Service's application of the maximum five/six year period of stay for certain H–1 nurses only if the applicant was subsequently reinstated to H–1 status in accordance with the terms of Public Law 101–656 (Immigration Amendments of 1988).

(3) *Effect of departure.* The departure and subsequent reentry of an individual who was employed without authorization in the United States after January 1, 1977 does not erase the bar to adjustment of status in section 245(c)(2) of the Act. Similarly, the departure and subsequent reentry of an individual who has not maintained a lawful immigration status on any previous entry into the United States does not erase the bar to adjustment of status in section 245(c)(2) of the Act for any application filed on or after November 6, 1986.

8 C.F.R. §§ 274a.12(b)(12) and (20)

(b) *Aliens authorized for employment with a specific employer incident to status.* The following classes of nonimmigrant aliens are authorized to be employed in the United States by the specific employer and subject to the restrictions described in the section(s) of this chapter indicated as a condition of their admission in, or subsequent change to, such classification. An alien in one of these classes is not issued an employment authorization document by the Service:

....

(12) An intra-company transferee (L–1), pursuant to §214.2(1) of this chapter. An alien in this status may be employed only by the petitioner through whom the status was obtained;

....

(20) A nonimmigrant alien within the class of aliens described in paragraphs (b)(2), (b)(5), (b)(8), (b)(9), (b)(10), (b)(11), (b)(12), (b)(13), (b)(14), (b)(16), and (b)(19) of this section whose status has expired but who has filed a timely application for an extension of such stay pursuant to §§214.2 or 214.6 of this chapter. These aliens are authorized to continue employment with the same employer for a period not to exceed 240 days beginning on the date of the expiration of the authorized period of stay. Such

authorization shall be subject to any conditions and limitations noted on the initial authorization. However, if the district director or service center director adjudicates the application prior to the expiration of this 240 day period and denies the application for extension of stay, the employment authorization under this paragraph shall automatically terminate upon notification of the denial decision;

8 C.F.R. § 1245.1(d)

(d) *Definitions* —(1) *Lawful immigration status.* For purposes of section 245(c)(2) of the Act, the term "lawful immigration status" will only describe the immigration status of an individual who is:

(i) In lawful permanent resident status;

(ii) An alien admitted to the United States in nonimmigrant status as defined in section 101(a)(15) of the Act, whose initial period of admission has not expired or whose nonimmigrant status has been extended in accordance with part 214 of 8 CFR chapter I;

(iii) In refugee status under section 207 of the Act, such status not having been revoked;

(iv) In asylee status under section 208 of the Act, such status not having been revoked;

(v) In parole status which has not expired, been revoked or terminated; or

(vi) Eligible for the benefits of Public Law 101–238 (the Immigration Nursing Relief Act of 1989) and files an application for adjustment of status on or before October 17, 1991.

(2) *No fault of the applicant or for technical reasons.* The parenthetical phrase *other than through no fault of his or her own or for technical reasons* shall be limited to:

(i) Inaction of another individual or organization designated by regulation to act on behalf of an individual and over whose actions the individual has no control, if the inaction is acknowledged by that individual or organization (as, for example, where a designated school official certified under §214.2(f) of 8 CFR chapter I or an exchange propram sponsor under §214.2(j) of 8 CFR chapter I did not provide required notification to the Service of continuation of status, or did not forward a request for continuation of status to the Service); or

(ii) A technical violation resulting from inaction of the Service (as for example, where an applicant establishes that he or she properly filed a timely request to maintain status and the Service has not yet acted on that request). An individual whose refugee or asylum status has expired through passage of time, but whose status has not been revoked, will be considered to have gone out of status for a technical reason.

(iii) A technical violation caused by the physical inability of the applicant to request an extension of nonimmigrant stay from the Service either in person or by mail (as, for example, an individual who is hospitalized with an illness at the time nonimmigrant stay expires). The explanation of such a technical violation shall be accompanied by a letter explaining the circumstances from the hospital or attending physician.

(iv) A technical violation resulting from the Service's application of the maximum five/six year period of stay for certain H–1 nurses only if the applicant was subsequently reinstated to H–1 status in accordance with the terms of Public Law 101–656 (Immigration Amendments of 1988).

(3) *Effect of departure.* The departure and subsequent reentry of an individual who was employed without authorization in the United States after January 1, 1977 does not erase the bar to adjustment of status in section 245(c)(2) of the Act. Similarly, the departure and subsequent reentry of an individual who has not maintained a lawful immigration status on any previous entry into the United States does not erase the bar to adjustment of status in section 245(c)(2) of the Act for any application filed on or after November 6, 1986.